Supreme Court, U.S.
FILED

No. 03 819 DEC 1 2003

In The
Supreme Court of the United States

*INFO*USA, INC. AND AMERICAN BUSINESS INFORMATION MARKETING, INC.,

Petitioners,

v.

CLAUDE M. SCHOCH,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED FOR REVIEW

Should this Court resolve the conflict among the lower courts as to whether they must enforce arbitration agreement provisions, for which contracting parties have fairly bargained, requiring heightened judicial review of arbitrators' awards?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Petitioners *info*USA, Inc. and American Business Information Marketing, Inc. state that they do not have parent corporations and that no publicly held companies own 10% or more of their stock.

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OPINIONS BELOW

The opinion of the United States Court of Appeals for the Eighth Circuit, App., *infra*, at 1a-10a, is reported at 341 F.3d 785. The memorandum and order of the district court, App., *infra*, at 11a-17a, is not reported.

JURISDICTION

The United States Court of Appeals for the Eighth Circuit entered judgment on September 3, 2003. App., *infra*, at 1a. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

The instant matter involves the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16 (2003), the relevant provisions of which are reproduced herein. App., *infra*, at 18a-21a.

STATEMENT

This case raises important, recurring, yet still unsettled questions relating to the fundamental purpose of the FAA: whether courts must enforce arbitration agreement provisions, for which contracting parties have fairly bargained, requiring heightened judicial review of arbitrators' awards. Although the FAA's provisions themselves govern this fundamental issue, decisions from the lower courts have been in conflict and have created confusion. Some courts have enforced these provisions and applied heightened judicial review. Other courts, such as the one

below, have refused to enforce these provisions, effectively denying contractual parties, such as Petitioners and Respondent, the benefits for which they fairly bargained. Thus, this issue merits final resolution by this Court.

I. The Federal Arbitration Act and Heightened Judicial Review Litigation

In 1925, Congress codified the FAA to overcome the courts' historic refusal to enforce arbitration agreements in the same manner as other contracts. *Allied-Bruce Terminix Cos., Inc. v. Dobson*, 513 U.S. 265, 270-71, 130 L. Ed. 2d 753, 762, 115 S. Ct. 834, 838 (1995); *see also* 9 U.S.C. § 2 (providing that arbitration agreements "shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract."). Now, courts must "enforce arbitration agreements into which parties had entered . . . and [] place such agreements upon the same footing as other contracts." *Allied-Bruce*, 513 U.S. at 271, 130 L. Ed. 2d at 762, 115 S. Ct. at 838 (quotation marks omitted). The FAA makes arbitration agreements just as enforceable as other contracts; not less so, "not more so." *Prima Paint Corp. v. Flood & Conklin Mfg. Co.*, 388 U.S. 395, 404 n.12, 18 L. Ed. 2d 1270, 1277 n.12, 87 S. Ct. 1801, 1806 n.12 (1967).

At the same time Congress required courts to enforce arbitration agreements as other contracts, it provided for the default judicial review of arbitrators' awards. *See* 9 U.S.C. §§ 10, 11. As a result, Congress created the potential for conflict. Specifically, section 2 of the FAA requires that arbitration agreements be treated as all other contracts; but, some courts have interpreted sections 10 and 11 to limit the enforcement of some arbitration clauses (for

example, those seeking heightened judicial review). Inevitably, widespread conflict and confusion have resulted in the decisions of the lower courts.

The United States Courts of Appeals for the Third, Fourth, and Fifth Circuits, and district courts in the First and Second Circuits, have held that courts must enforce provisions for heightened judicial review. *Roadway Package Sys., Inc. v. Kayser*, 257 F.3d 287, 293 (3d Cir. 2001); *Hughes Training Inc. v. Cook*, 254 F.3d 588, 593 (5th Cir. 2001); *Syncor Int'l Corp. v. McLeland*, 120 F.3d 262 (4th Cir. 1997) (table), No. 96-2261, 1997 U.S. App. LEXIS 21248, at *17 (4th Cir. Aug. 11, 1997) (unpublished opinion); *Gateway Techs., Inc. v. MCI Telecomms. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995); *New Eng. Utils. v. Hydro-Quebec*, 10 F. Supp. 2d 53, 64 (D. Mass. 1998); *Fils et Cables d' Acier de Lens v. Midland Metals Corp.*, 584 F. Supp. 240, 244 (S.D.N.Y. 1984). The United States Courts of Appeals for the Seventh, Eighth, Ninth, and Tenth Circuits have reached the opposite conclusion. *Kyocera Corp. v. Prudential-Bache T Servs.*, 341 F.3d 987, 1000 (9th Cir. 2003); *Schoch v. InfoUSA, Inc.*, 341 F.3d 785, 789 n.3 (8th Cir. 2003) (expressing strong skepticism as to whether parties can ever bargain for heightened judicial review); *Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 937 (10th Cir. 2001); *UHC Mgmt. Co., Inc. v. Computer Scis. Corp.*, 148 F.3d 992, 997, 998 (8th Cir. 1998) (expressing strong skepticism as to whether parties can ever bargain for heightened judicial review); *Chicago Typographical Union No. 16 v. Chicago Sun-Times, Inc.*, 935 F.2d 1501, 1505 (7th Cir. 1991).

II. Petitioners and Respondent Bargained for Heightened Judicial Review of the Arbitrator's Award

A. The Beginning and the End of the Relationship Between Petitioners and Respondent

In September 1996, Petitioners bought Respondent's business. App., *infra*, at 2a, 14a, 22a. In return, Respondent received more than $20 million in cash and stock, term employment for an annual salary of $225,000, and stock options. *Id.* at 2a, 14a. According to the terms of a series of written contracts and his testimony in a separate legal proceeding, Respondent's employment with Petitioners was for a three-year term ending on September 9, 1999. *Id.* Under the terms of the controlling documents, Respondent's stock options lapsed three months after the conclusion of this "employment or consulting relationship." *Id.*

Around the time his employment agreement expired, Respondent began asking Petitioners to create a new relationship so that he could receive an additional 90,000 stock options. *Id.* at 2a, 14a, 24a. In the hope that Petitioners would acquiesce to his requests, Respondent volunteered to do minimal work without pay. *Id.* Petitioners, however, did not agree to enter into a new employment relationship. *Id.* Thus, Respondent's employment with Petitioners expired on September 9, 1999 and Respondent's stock options lapsed on December 10, 1999. *Id.* at 2a, 14a, 23a-24a.

Respondent did not exercise his stock options before they lapsed. *Id.* at 2a, 14a, 23a. Instead, on December 17, 1999, a week after they expired, Respondent attempted to tender his options. *Id.* Petitioners refused Respondent's

tender, explaining that it was more than three months past the termination of his employment. *Id.* This lawsuit followed. *Id.* at 3a, 14a.

B. The Agreement to Arbitrate with Heightened Judicial Review

On June 8, 2001, during the pendency of this litigation, Petitioners and Respondent agreed to submit their dispute to arbitration. App., *infra*, at 3a, 14a, 31a-35a. The parties jointly negotiated and ultimately executed a detailed arbitration agreement providing, in relevant part, that

> [t]he arbitrator's decision and award shall be *valid and binding*, judgment may be entered on such award, and such award shall be final as to the Parties, *as long as the Arbitrator has not exceeded his or her authority* (i.e., the award would be . . . *resolved in accordance with applicable law*).

Id. at 3a, 32a-33a (emphasis added). Additionally, the parties also required that the arbitration award include findings of fact and conclusions of law to ensure that an adequate record was made for judicial review. *Id.* at 3a, 32a. As set forth more fully below, the courts below neither construed the operative language ("valid and binding . . . as long as . . . resolved in accordance with the law") nor considered the relationship between that language and the requirement for findings of fact and conclusions of law.

The arbitration agreement did not seek to create new jurisdiction for the court, nor did it ask the court to review matters exceeding the court's broad expertise; *i.e.*, it did not require "expanded" judicial review. Rather, this provision

only expressed the parties' intent to opt-out of the default FAA vacatur standards and asked the court to more seriously review the arbitration award; *i.e.*, it promised "heightened" judicial review. So, the arbitration agreement provided for a hearing, an award with findings of fact and conclusions of law, and heightened, but not expanded, judicial review of the substantive legal issues.

C. The Hearing and the Arbitrator's Award

At the three-day hearing, the parties asked the arbitrator to resolve two disputes: (1) whether Respondent's stock options lapsed before he tendered them, which required a determination of when his employment ended; and (2) if Respondent's stock options did not lapse before he tendered them, the amount of his damages, if any. App., *infra*, at 24a, 27a.

As to liability, the arbitrator found that Respondent's claim depended upon whether his "employment or consulting relationship" continued after the expiration of his employment agreement. *Id.* at 24a-25a. The arbitrator held that "[w]hen [Respondent] attempted to exercise his options on December 17, 1999, he was in an employee but not a in [sic] consulting relationship with [Petitioner]." *Id.* 25a. This conclusion directly contradicted the arbitrator's holding that Respondent "indeed was not paid for any work after September 10, 1999, nor did he expect payment. . . . [Respondent] was a volunteer only in the sense that he voluntarily worked without pay and not that he voluntarily did work that was not requested." *Id.* at 25a-26a. Thus, the arbitrator concluded that even though Respondent was a volunteer and not in a consulting relationship with Petitioners, he was nonetheless entitled

to stock options because he was in some non-consultant, non-employment "employee relationship" after September 9, 1999. *Id.*

Then, the arbitrator assessed damages. *Id.* at 27a-28a, 30a. In this discussion, the arbitrator expressly rejected as speculative Respondent's claim that he would have exercised and sold all of the subject stock options at a profit. *Id.* at 27a. On the other hand, the arbitrator opined that "it is difficult to find on any factual or evidentiary basis that [Respondent] would not have sold any of the 270,000 shares during the applicable time period." *Id.*

Having rejected both extremes of "all or nothing," the arbitrator did not make any findings of fact as to the amount of shares Respondent reasonably would have sold. *See id.* at 27a-28a, 30a. Instead, the arbitrator simply "adopt[ed] as [his] material findings" the critique of Respondent's position that was offered by Petitioners' damages expert. *Id.* at 28a, 30a. Significantly, because this portion of testimony was a critique of Respondent's position, not a recitation of the expert's opinion, it started from the same assumption advanced by Respondent, which the arbitrator had already rejected as "too speculative to accept": a hypothetical sale of all 270,000 shares at a profit. *See id.* Petitioners raised this fundamental inconsistency with the arbitrator in their May 28, 2002 request for clarification. *See id.* at 30a. During the award clarification hearing, the arbitrator stated: "Well, [Petitioners] may make a point about the fact that both Sherman and Cobb based [their calculations] upon selling all the shares at a profit. That certainly bears some review on my part." Nevertheless, the arbitrator made no changes to his award as it bore on the number of shares that Respondent reasonably would have sold for a profit. *Id.*

III. The District Court's Decision

On December 19, 2002, the district court granted Respondent's motion to confirm the arbitration award, denied Petitioners' motion to vacate the arbitration award, and entered judgment in favor of Respondent. App., *infra*, at 17a. Despite the arbitration agreement's provision for heightened judicial review, the district court's memorandum and order began by noting that the "scope of review of an arbitrator's decision is very narrow." *Id.* at 11a. The district court did not construe the operative language at issue and did not analyze whether the arbitrator had exceeded his powers or performed them imperfectly under the FAA, but instead generally deferred to the arbitrator's conclusions. *See id.* at 11a-17a.

> I have carefully reviewed the Award entered by [the arbitrator]. Although there was not a substantial amount of case law cited, [the arbitrator] clearly made legal and factual findings and determinations. For example, he determined that [Respondent] was an employee in December of 1999. Although he cited no cases, he reviewed the contract to determine the language that related to [Respondent's] status as an employee or a volunteer, and the discussion therein included factors from relevant case law. That finding was crucial to the decision in this case. *Even though this finding might have been in error, the arbitrator acted within the scope of his authority in construing the contract.*
>
> Further, [the arbitrator] made findings regarding the credibility of the expert witnesses and made determinations based on this testimony. I conclude that these determinations were based on the arbitrator's interpretation of the contract. I find that [the arbitrator] did not violate any of

> the statutory grounds upon which I could vacate an arbitration award. The arbitrator's decision does in fact draw its essence from the contract. Consequently, pursuant to the case law cited herein and my limited review of the decision, I affirm the Award issued by the arbitrator.

Id. at 16a-17a (emphasis added).

On January 17, 2003, Petitioners timely filed their notice of appeal to the United States Court of Appeals for the Eighth Circuit. *See id.* at 1a.

IV. The Court of Appeals' Decision

Exercising its proper jurisdiction, a panel of the United States Court of Appeals for the Eighth Circuit affirmed the district court's incorrect decision. App., *infra*, at 1a. The panel first recognized that "the circuit courts are split on whether parties to arbitration agreements can expand the scope of judicial review of arbitration awards." *Id.* at 5a. Then, it stated that "[o]ur court has specifically reserved resolving this issue until the circumstances require it." *Id.* at 6a (citing *UHC*, 148 F.3d at 997). The panel characterized the *UHC* decision as "[e]xpressing grave skepticism," and as noting that if parties could contract for heightened judicial review "the parties' intent to do so must be clearly and unmistakably expressed." *Id.* at 6a-7a. Again presented with the issue, the court below stated

> [w]hile we do not expressly adopt the Tenth Circuit's persuasive reasoning in *Bowen*, we again express skepticism as to whether parties can contract for heightened judicial review of arbitration awards, which would seemingly amend the FAA, crown arbitrators mini-district courts, force federal trial courts to sit as appellate courts, and

> completely transform the nature of arbitration and judicial review.

Id. at 7a n.3.

In curtly assessing the arbitration provision at hand, the panel began by finding that Petitioners and Respondent "had fair warning they needed appropriate language to create heightened judicial review" because *UHC* was decided before the arbitration agreement was executed. *Id.* at 7a. "If [Petitioners] and [Respondent] intended to contract for heightened judicial scrutiny, as [Petitioners] claim[ ] they did, one would imagine they would express such an intent using crystal-clear language. They did not." *Id.* Thus, the panel applied "an extraordinary level of deference" to the arbitrator's award. *Id.* at 4a. "We are simply not authorized to reconsider the merits of an arbitral award, even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract." *Id.*

Under this cursory judicial review, the panel found that the arbitrator "reasonably complied with his contractual authority" by conducting a three-day hearing and by reviewing the parties' written briefs before issuing a nine-page award. *Id.* at 8a. "Because the arbitrator attempted to comply with the parties' agreement, the award was not completely irrational, as it drew its essence from the agreement. . . . Even if the arbitrator made legal errors, he did not completely ignore the law." *Id.* at 9a. The panel concluded

> *[a]lthough we may disagree with the arbitrator's factual findings or legal analysis, our limited review does not authorize us to substitute our judgment for that of an arbitrator hired by the*

> *parties*. . . . [Petitioners] did not bargain for the benefits and protections of our state or federal judicial systems. Instead, [Petitioners] chose to resolve its dispute quickly and efficiently through arbitration. [Petitioners] got exactly what [they] bargained for.

Id. at 9a-10a (emphasis added).

Significantly, although the court below nakedly concluded that the arbitration agreement at issue did not qualify for heightened judicial review, it completely avoided positively construing the contract's operative language. *See id.* at 1a-10a. The court never explained the meaning of the provision limiting the arbitrator's authority to rendering decisions "in accordance with applicable law," if it does not mean that a reviewing court would review the substantive legal basis for the award in determining whether the arbitrator exceeded his authority. *See id.*

REASONS FOR GRANTING THE PETITION

The decision below perpetuates a conflict among the circuits on an important and frequently recurring issue of federal law: whether courts must enforce contracts for heightened judicial review of an arbitrator's award.

The court below, like the United States Courts of Appeals for the Seventh, Ninth, and Tenth Circuits, held that courts need not enforce such agreements. The United States Courts of Appeals for the Third, Fourth, and Fifth Circuits, and district courts in the First and Second

Circuits, have reached the opposite conclusion. This significant conflict is shown by the following table:

ENFORCING HEIGHTENED REVIEW PROVISIONS	IGNORING HEIGHTENED REVIEW PROVISIONS
Third Circuit. *Roadway*, 257 F.3d at 293.	**Seventh Circuit**. *Chicago Typographical*, 935 F.2d at 1505.
Fourth Circuit. *Syncor*, 1997 U.S. App. LEXIS 21248, at *17.	**Eighth Circuit**. *Schoch*, 341 F.3d at 789 n.3 (expressing strong skepticism as to whether parties can ever bargain for heightened judicial review); *UHC*, 148 F.3d at 997, 998 (same).
Fifth Circuit. *Hughes*, 254 F.3d at 593; *Gateway*, 64 F.3d at 997.	**Ninth Circuit**. *Kyocera*, 341 F.3d at 1000.
District of Massachusetts. *New Eng. Utils.*, 10 F. Supp. 2d at 64.	**Tenth Circuit**. *Bowen*, 254 F.3d at 937.
Southern District of New York. *Fils et Cables*, 584 F. Supp. at 244.	

This Court, while not deciding the issue at bar, has implied that courts should enforce contractual provisions adjusting judicial review of arbitration awards. *See Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 104-115, 103 L. Ed. 2d 80, 88-95, 109 S. Ct. 948, 951-57 (1989) (suggesting, in the ERISA context, that parties may

contract for a narrower standard of review than that normally applied under federal common law).

Only this Court can bring clarity to this important area of federal law. As recently stated by a commentator, "[t]he silence of the Supreme Court, coupled with the inconsistent lower court decisions, creates uncertainty and current tension in arbitration law. . . . This split in the circuits can only lead to more uncertainty and less willingness to submit claims to arbitration." Margaret M. Maggio & Richard A. Bales, *Contracting Around the FAA: The Enforceability of Private Agreements to Expand Judicial Review of Arbitration Awards*, 18 OHIO ST. J. ON DISP. RESOL. 151, 155, 178 (2002).

I. The Circuits Are in Conflict Whether Parties May Contract for Broader Judicial Review of Arbitration Awards than the Default Provided by the Federal Arbitration Act

The confusion of the court below reflects the conflict in the circuits. App., *infra.*, at 5a ("the circuit courts are split on whether parties to arbitration agreements can expand the scope of judicial review of arbitration awards."). On one hand, the United States Courts of Appeals for the Seventh, Eighth, Ninth, and Tenth Circuits have held that parties may never contract for heightened judicial review of arbitration awards. *Kyocera*, 341 F.3d at 1000; *Schoch*, 341 F.3d at 789 n.3 (expressing strong skepticism as to whether parties can ever bargain for heightened judicial review); *Bowen*, 254 F.3d at 937; *UHC*, 148 F.3d at 997, 998 (expressing strong skepticism as to whether parties can ever bargain for heightened judicial review); *Chicago Typographical*, 935 F.2d at 1505. On the other hand, the

United States Courts of Appeals for the Third, Fourth, and Fifth Circuits, and district courts in the First and Second Circuits, have held the opposite, allowing parties to contract for heightened judicial review of arbitration awards. *Roadway*, 257 F.3d at 293; *Hughes*, 254 F.3d at 593; *Syncor*, 1997 U.S. App. LEXIS, at *17; *Gateway*, 64 F.3d at 997; *New Eng. Utils.*, 10 F. Supp. 2d at 64; *Fils et Cables*, 584 F. Supp. at 244.

Moreover, the conflict and confusion in the lower courts are exemplified by a series of decisions from the United States Court of Appeals for the Ninth Circuit. A panel first decided that "[f]ederal courts can expand their review of an arbitration award beyond the FAA's grounds, when (but only to the extent that) the parties have so agreed. To do otherwise would make hostility to arbitration agreements erumpent under the guise of deference to the arbitration concept." *Lapine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 889 (9th Cir. 1997), *vacated*, *Kyocera*, 341 F.3d at 1000. Then, almost six years later, the Ninth Circuit *en banc* reversed the panel. *Kyocera*, 341 F.3d at 1000. "We therefore overrule *LaPine I*, affirm the district court's 1995 conclusion, and hold that a federal court may only review an arbitral decision on the grounds set forth in the Federal Arbitration Act. Parties have no power to alter or expand those grounds, and any contractual provision purporting to do so is, accordingly, legally unenforceable." *Id.*

Not only have courts disagreed as to whether parties may ever bargain for heightened judicial review, they are also in conflict as to how parties would express such a bargain. In the cases upholding heightened judicial review, courts have looked to the intent of the contracting parties. For example, in *Gateway*, the United States Court of Appeals for the Fifth Circuit upheld the parties' ability to

contract for heightened judicial review. *Gateway*, 64 F.3d at 997. There, the arbitration agreement provided that "the arbitration decision shall be final and binding on both parties, except that errors of law shall be subject to appeal." *Id.* at 995. Even though this provision did not use crystal-clear language regarding heightened review, the panel found it sufficient to demonstrate the parties' intent. *See also New Eng. Utils.*, 10 F. Supp. 2d at 64 (finding that the parties contracted for heightened judicial review by providing that "any party may petition a court of competent jurisdiction for review of errors of law.").

The decision below leaves Petitioners, Respondent, and all other contracting parties directionless amidst a state of confusion and conflict in the law. The court recognized that "the circuit courts are split on whether parties to arbitration agreements can expand the scope of judicial review of arbitration awards." App., *infra*, at 5a. But, when presented with the issue, it specifically reserved its decision until the parties' intent to contract for heightened judicial review is "clearly and unmistakably expressed." *Id.* And, it required that Petitioners and Respondent "express such an intent using crystal-clear language." *Id.* Nevertheless, the court below offered no guidance as to what would satisfy its "crystal clear" language standard. Instead, it stated that "we again express skepticism as to whether parties can contract for heightened judicial review of arbitration awards, which would seemingly amend the FAA, crown arbitrators mini-district courts, force federal trial courts to sit as appellate courts, and completely transform the nature of arbitration and judicial review." *Id.* This holding conflicts with other circuits regarding whether and how parties may contract for heightened judicial review of arbitration awards. Thus,

the decision below exemplifies the conflict and confusion in this area of the law and necessitates review by this Court.

Finally, the issue presented is recurring and of great practical importance. Arbitration clauses are frequently used and their enforcement is often at issue in the federal courts. Currently, parties are unsure how to draft their arbitration agreements. Until resolved, this uncertainty will decrease the use of arbitration since parties will have no assurance that arbitration agreements will be enforced according to all of their terms, like other contracts.

II. The Decision Below Is Incorrect

A. The Court Below's Refusal to Enforce Contracts for Heightened Judicial Review Is Erroneous

1. The court below failed by refusing to recognize that heightened judicial review is actually a subset of the FAA's "off the rack" standards for vacatur, modification, and correction, and not extra-statutory. Section 9 of the FAA indicates that confirmation is compelled "if the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration. . . ." 9 U.S.C. § 9. Thus, an agreement that judgment shall be entered by a court is essential to the confirmation process. In that light, a provision for heightened judicial review is merely a condition of the agreement that the award may be confirmed by a court. Otherwise stated, a provision for heightened judicial review makes confirmation of an award contingent upon the court's proper application of the level of review specified by the contract.

The FAA directs courts to review the arbitration agreement, determine the extent of the arbitrator's powers, review the arbitrator's award, and determine whether that award exceeded the arbitrator's powers. One manner to ensure heightened judicial review under the FAA is to place express limits on the arbitrator's powers, as was done in the instant contract. The FAA itself proscribes that parties can tailor the scope of the arbitrator's powers and strength of the arbitrator's award. Specifically, Congress drafted section 10 broadly to expressly allow vacatur in all instances "where the arbitrators exceeded their powers. . . ." 9 U.S.C. § 10(a)(4). Section 11 of the FAA also expressly allows a court to modify or correct an award "[w]here the arbitrators have awarded upon a matter not submitted to them. . . ." 9 U.S.C. § 11(b). For example, a court would review an award regarding tort issues quite closely if the arbitration agreement limited the arbitrator to deciding only breach of contract issues.

Provisions for findings of fact and conclusions of law are another example of narrowing the arbitrator's authority. An arbitrator's failure to provide specific findings of fact and conclusions of law (when required by the arbitration agreement), by itself, warrants vacating an arbitration award. *Western Employers Ins. Co. v. Jefferies & Co., Inc.*, 958 F.2d 258, 262 (9th Cir. 1992) ("[b]y failing to provide Western with findings of fact and conclusions of law, the NASD panel clearly failed to arbitrate the dispute according to the terms of the arbitration agreement. In so doing, the panel exceeded its authority under 9 U.S.C. § 10(d)."). And, findings of fact and conclusions of law often work in tandem with heightened judicial review, allowing a reviewing court to ascertain the arbitrators'

decisions with confidence and without speculation. *See New Elliott Corp. v. Man Gutehoffnungshutte AG*, 969 F. Supp. 13, 15 (S.D.N.Y. 1997) ("the touchstone is simply whether enough facts are found and enough legal principles stated so that a reviewing tribunal can ascertain the reasons for the ultimate determination.").

Contractual provisions for heightened judicial review are no different; they merely narrow the arbitrator's powers. Consequently, in *Gateway*, instead of limiting the arbitrator's powers by subject matter, the arbitration agreement limited the arbitrator's powers to appropriately determining and applying the law. *Gateway*, 64 F.3d at 997. There, the arbitrator exceeded his powers when he made errors of law. Therefore, heightened judicial review is actually a subset of the expressly authorized vacatur for "exceeding their powers."

2. Additionally, the FAA's express grounds for vacatur are nonexclusive. The FAA directs courts to enter judgment upon an arbitration award "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." 9 U.S.C. § 9. Sections 10 and 11 provide several "off-the-rack" or default instances where a court may vacate, modify, or correct an arbitration award. 9 U.S.C. §§ 10, 11. Importantly, however, the FAA does not indicate that sections 10 and 11 are exclusive grounds for vacatur. In fact, the language is permissive and uses the nonexclusive words "any" and "may." *Id.* Even the obligatory section 9 uses the phrase "as prescribed in sections 10 and 11," which explicitly incorporates those sections' nonexclusivity. So, the FAA allows a court to vacate, modify, or correct for reasons not expressly specified in the statute.

For many years, federal courts have recognized that the default rules announced by the FAA are not comprehensive. For example, courts will reverse an arbitrator's award where it is a "manifest disregard of the law," *see First Options of Chicago, Inc. v. Kaplan*, 514 U.S. 938, 942, 131 L. Ed. 2d 985, 992, 115 S. Ct. 1920, 1923 (1995); *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 656, 87 L. Ed. 2d 444, 474, 105 S. Ct. 3346, 3369 (1985), or "completely irrational." *Shearson/American Express Inc. v. McMahon*, 482 U.S. 220, 259, 96 L. Ed. 2d 185, 215, 107 S. Ct. 2332, 2355 (1987).

Courts have held that parties may contract around the FAA's specific default provisions. "[A]rbitration is simply a matter of contract between the parties. . . ." *First Options*, 514 U.S. at 943, 131 L. Ed. 2d at 992, 115 S. Ct. at 1924. This Court has enforced contractual terms that have called for arbitration under rules other than those established by the FAA itself, *Volt Info. Scis., Inc. v. Board of Trs. of Leland Stanford Junior Univ.*, 489 U.S. 468, 479, 103 L. Ed. 2d 488, 500, 109 S. Ct. 1248, 1256 (1989), agreements to arbitrate punitive damages despite contrary state law, *Mastrobuono v. Shearson Lehman Hutton, Inc.*, 514 U.S. 52, 58, 131 L. Ed. 2d 76, 84, 115 S. Ct. 1212, 1216 (1995), and clauses limiting the scope of the issues submitted to arbitration. *First Options*, 514 U.S. at 942, 115 S. Ct. at 1923, 131 L. Ed. 2d at 992; *Mitsubishi*, 473 U.S. at 628, 105 S. Ct. at 3354-55, 87 L. Ed. 2d at 456.

3. At most, the FAA is ambiguous as to whether heightened judicial review falls under the ambit of "exceeded their powers" and whether the vacatur grounds are nonexclusive. Thus, this Court should consider the FAA's

broader context and Congress' primary purpose. *See Robinson v. Shell Oil Co.*, 519 U.S. 337, 346, 136 L. Ed. 2d 808, 816, 117 S. Ct. 843, 848 (1997) (considering an ambiguous statute's "broader context" and "primary purpose").

Simply, the FAA's primary purpose was to provide arbitration agreements exactly the same protections as other contractual provisions. *See Allied-Bruce*, 513 U.S. at 275, 130 L. Ed. 2d at 765, 115 S. Ct. at 840 ("a broad interpretation of this language is consistent with the Act's basic purpose, to put arbitration provisions on the same footing as a contract's other terms."); *Volt*, 489 U.S. at 478, 103 L. Ed. 2d at 500, 109 S. Ct. at 1255 (finding that the FAA requires courts "to enforce privately negotiated agreements to arbitrate, like other contracts, in accordance with their terms.") (quotation marks omitted).

> Arbitration under the Act is a matter of consent, not coercion, and parties are generally free to structure their arbitration agreements as they see fit. Just as they may limit by contract the issues that they will arbitrate so too may they specify by contract the rules under which that arbitration will be conducted. . . . By permitting the courts to "rigorously enforce" such agreements according to their terms, we give effect to the contractual rights and expectations of the parties, without doing violence to the policies behind by the FAA.

Id. at 479, 103 L. Ed. 2d at 500, 109 S. Ct. at 1256.

This Court has held that the goal of efficient and speedy dispute resolution is subject to "[t]he preeminent concern of Congress in passing the Act [ ] to enforce private

agreements into which parties had entered. . . ." *Dean Witter Reynolds Inc. v. Byrd*, 470 U.S. 213, 221, 84 L. Ed. 2d 158, 165, 105 S. Ct. 1238, 1242 (1985); *see also Mastrobuono*, 514 U.S. at 57, 131 L. Ed. 2d at 84, 115 S. Ct. at 1216 ("the FAA's proarbitration policy does not operate without regard to the wishes of the contracting parties."). "After all, the basic objective in this area is not to resolve disputes in the quickest manner possible, no matter what the parties' wishes, but to ensure that commercial arbitration agreements, like other contracts, are enforced according to their terms, and according to the intentions of the parties." *First Options*, 514 U.S. at 947, 131 L. Ed. 2d at 995, 115 S. Ct. at 1925 (citations and quotation marks omitted). Permitting parties to contract for heightened judicial review is consistent with the FAA's paramount policy of freedom to contract and the right to have that contract enforced by the judicial system exactly as stated, even though it may sometimes reduce efficiency and finality.

The FAA's primary purpose (and the enforcement of agreements for heightened judicial review) encourages arbitration. By allowing parties to have confidence that their arbitration agreement will be upheld according to its provisions, the number of parties voluntarily participating in the arbitration process could increase. The option of heightened judicial review decreases the risk of a bad decision, *i.e.*, one that is incorrect, but not so egregious as to satisfy the FAA's default grounds for vacatur.

> An obvious area of concern where judicial review of arbitration awards is limited to traditional FAA review is the fear of a denial of the parties' rights where arbitrators apply the wrong law but the error falls short of manifest disregard or

> other vacatur grounds. Currently, in the arbitration setting, the court is forbidden to substitute its own interpretation even if convinced that the arbitrator's interpretation was not only wrong, but plainly wrong.

Maggio & Bales, *supra*, at 193 (quoting *Chicago Typographical*, 935 F.2d at 1505) (quotation marks and brackets omitted). Parties who have not agreed to arbitration in the past because they feared an incorrect and essentially unreviewable arbitration award should be able to select their scope of judicial review. The failure to enforce arbitration agreements as parties expect may result in them foregoing any attempt to arbitrate and force them to immediately seek direct relief from the courts. Therefore, the option of heightened judicial review for an arbitrator's award could further advance and stabilize arbitration.

4. Rest assured, however, that the enforcement of provisions for heightened judicial review will not result in heightened judicial review of all arbitration awards. Instead, consistent with the enforcement of these agreements as other contracts, the parties must indicate their intent for such review. Thus, it is truly an option (of many) for the parties, which will encourage more arbitration by allowing them to tailor the process to their circumstances and needs.

Also, certain parties should not be bound by provisions for heightened judicial review. For example, if this Court is concerned with the consequences related to contracts between those with unequal bargaining power, this Court could craft a rule for their protection. Lee Goldman, *Contractually Expanded Review of Arbitration Awards*, 8 HARV. NEGOTIATION L. REV. 171, 199-200 (2003).

Here, the agreement at issue was entered into by sophisticated parties, App., *infra*, at 7a, and does not concern inequitable bargaining positions. The arbitration agreement was negotiated and executed during this litigation. Both parties were represented by counsel. Thus, the court below should have enforced the heightened judicial review provision.

5. Finally, a crucial determination is whether the arbitration agreement at issue only requests "heightened" judicial review. Although the terms are used interchangeably in the case law and the literature, a chasm separates "heightened" judicial review and "expanded" judicial review. The former merely expresses the parties' intent to opt-out of the default FAA vacatur standards and asks the court to more seriously review the arbitrator's decisions. Conversely, the latter could ask the court to review matters exceeding the court's expertise or that the court would not otherwise review in the absence of the parties' agreement. Potentially, expanded judicial review attempts to bestow jurisdiction upon courts. Heightened judicial review does not. Thus, while expanded judicial review may conflict with this Court's decisions regarding federal jurisdiction, heightened judicial review, such as that sought in the instant agreement, fits seamlessly with those basic principles and the FAA's structure.

B. The Court Below Erred by Failing to Seriously Review the Arbitrator's Award

1. Although not using any magic words, the arbitration agreement between Petitioners and Respondent unequivocally expresses their intent for heightened judicial review of certain issues. Consistent with the goal of enforcing the arbitration agreement as intended by the

parties, a contract may provide for heightened judicial review without exactly stating: "the arbitrator's award shall be subject to heightened judicial review." *See Gateway*, 64 F.3d at 995 ("the arbitration decision shall be final and binding on both parties, except that errors of law shall be subject to appeal."); *New Eng. Utils*, 10 F. Supp. 2d at 64 ("any party may petition a court of competent jurisdiction for review of errors of law."); Goldman, *supra*, at 173 n.13, 181-82 ("A typical provision expanding the scope of judicial review may require the award to be supported by substantial evidence or seek review for legal error."). And, any rule otherwise would unnecessarily restrict the parties' ability to bargain and contract and tailor arbitration to the circumstances and their needs, which would be contrary to the FAA's purpose of treating arbitration agreements as all other contracts.

Here, the arbitration agreement provided distinct limitations on the arbitrator's authority and sought heightened, but not expanded, judicial review. Specifically, the arbitration agreement expressly provided that the arbitrator's award is not final and binding and judgment may not be entered if the award was not "resolved in accordance with applicable law." App., *infra*, at 3a, 32a-33a. The unambiguous provision that the award was final only "as long as" the dispute was "resolved in accordance with applicable law" restricted the validity of the arbitrator's award and demanded heightened judicial review. *Id.* Moreover, the arbitration agreement expressly provided that the arbitrator exceeded his authority by not resolving the disputes in accordance with applicable law. *Id.* Thus, Petitioners and Respondent bargained for and agreed that the arbitrator's authority was narrowly tailored and that a

court could review the award for more than mere manifest disregard of the law.

Despite the parties' agreement for heightened judicial review and the court's concerns with the arbitrator's analysis, *id.* at 9a, 16a, the court below blindly deferred. Basically, the court held that the arbitrator "reasonably complied with his contractual authority" by conducting a three-day hearing and by reviewing the parties' written briefs before issuing a nine-page award. *Id.* at 8a. "Because the arbitrator attempted to comply with the parties' agreement, the award was not completely irrational, as it drew its essence from the agreement. . . . Even if the arbitrator made legal errors, he did not completely ignore the law." *Id.* at 9a.

The decision of the court below directly conflicts with the arbitration agreement between Petitioners and Respondent. The courts' highly deferential review is not "exactly what [the parties] bargained for." According to the arbitration agreement's terms, the arbitrator's decision was not final or binding if it was not "in accordance with applicable law." Petitioners and Respondent did not contract for the arbitrator to merely *attempt* to comply with their agreement or to not *completely* ignore the law. Yes, the parties intended a quick and efficient resolution of their dispute, but not if that sacrificed a decision that was "in accordance with applicable law."

Although the language at issue is not as broad as the court below has demanded, the parties' intent for heightened judicial review is evident. The specific language selected by the parties shows that their intent was not that *all* issues would be subject to broad heightened judicial review. Instead, the arbitration agreement is narrowly tailored so that a reviewing court will only apply

heightened judicial review to the legal issues. So, a reviewing court will still apply the FAA's default standards of review for the arbitrator's findings of fact.

This arrangement is quintessentially consistent with the FAA: the parties crafted the process for their circumstances and needs, deciding the levels of speed and review they considered appropriate. Otherwise stated, the clearest provision for heightened judicial review – a magic phrase like "the arbitrator's award shall be subject to heightened judicial review" – broadly subjects all of the arbitrator's findings and decisions strenuous review, but reduces speed and efficiency. Here, however, the heightened judicial review is limited to the resolution of the dispute "in accordance with applicable law." So, Petitioners and Respondent actually agreed for heightened judicial review that was limited to a certain subject-matter: the application of the law. Not only are courts competent to review the application of the law, but this limitation achieves the FAA's secondary goal of efficiency while maintaining review with which the parties are comfortable. And, consistent with this efficiency, Petitioners have never contested the facts as found by the arbitrator, just his application of the undisputed law to those facts.

The parties' agreement that the arbitrator issue findings of fact and conclusions of law further supports their intent for heightened judicial review. As discussed above, findings of fact and conclusions of law facilitate a reasonable review of the award, based on the record, to ascertain the reasons for the arbitrator's decisions. *New Elliott*, 969 F. Supp. at 15.

In fact, neither of the courts below even attempted to explain what the phrase "resolved in accordance with

applicable law" means, if not heightened judicial review. This is particularly disconcerting as the courts below merely read this provision out of the arbitration agreement. Under long-settled law, courts "must interpret the contract in a manner that gives meaning to all of its provisions and makes sense." *McAbee Constr. v. United States*, 97 F.3d 1431, 1435 (Fed. Cir. 1996) (citing *Hughes Communications Galaxy, Inc. v. United States*, 998 F.2d 953, 958 (Fed. Cir. 1993)); *see also Reisig v. Allstate Ins. Co.*, 264 Neb. 74, 81, 645 N.W.2d 544, 550 (Neb. 2002) ("The contract must be construed as a whole, and if possible, effect must be given to every part thereof."). Violation of this basic tenet of contract law is inconsistent with treating arbitration agreements as other contracts.

Finally, the decision below fails to recognize that its conclusion favors clever contract drafting over the intent of the parties.

> [A] clause providing for expanded judicial review could be redrafted to come within the express provisions of section 10(a)(4). *For example, the agreement could limit the arbitrator's power to issue decisions supported by substantial evidence and/or existing law.* In that case, expanded judicial review would be required to determine whether the arbitrators exceeded their power. The language of the statute should not be so inflexible that the legality of clauses with identical meaning and intent depends upon how cleverly they are drafted.

Goldman, *supra*, at 181-182 (emphasis added). The Court should note that Petitioners and Respondent crafted a provision for heightened judicial review in precisely the same manner offered by Professor Goldman. He suggests

that "the agreement could limit the arbitrator's power to issue decisions supported by . . . existing law." *Id.* And, this is what Petitioners and Respondent did. Therefore, the court below erred by refusing to enforce the parties' bargain for heightened judicial review.

2. The arbitrator, however, did not resolve the award in accordance with applicable law. Not only did he ignore the undisputed applicable law defining "employee," *see Omaha World Herald v. Dernier*, 253 Neb. 215, 222-223, 570 N.W.2d 508, 514 (Neb. 1997) (detailing the factors that must be considered in determining whether one performs services for another as an employee); *Thomas v. Kearney Little League Baseball Ass'n*, 5 Neb. App. 405, 408-12, 558 N.W.2d 842, 845-47 (Neb. Ct. App. 1997) (holding that plaintiff was a non-employee volunteer because he rendered services without an intention or understanding that he was to be paid); *Hatcher v. Bellevue Volunteer Fire Dept.*, 262 Neb. 23, 30, 628 N.W.2d 685, 692 (Neb. 2001) (defining volunteer under Nebraska law as "someone who performs services without expecting to be paid"), the arbitrator concocted his own version of the law. App., *infra*, at 25a-26a (creating an "employee relationship" category, which is neither volunteer nor employment, the only legally recognized categories). Similarly, instead of applying the undisputed applicable law regarding damages, which prohibited speculation, *Gagne v. Severa*, 259 Neb. 884, 892, 612 N.W.2d 500, 506 (Neb. 2000); *Union Ins. Co. v. Land & Sky, Inc.*, 253 Neb. 184, 188, 568 N.W.2d 908, 911 (Neb. 1997), the arbitrator invented the damages amount. App., *infra*, at 27a-28a, 30a. Interestingly, both courts below implied that they disagreed with the arbitrator's conclusion, but that they felt bound by their limited review. *Id.* at 9a, 16a. This type of rough "industrial

justice" is precisely what the parties sought to avoid by heightened judicial review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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November 26, 2003

United States Court of Appeals
FOR THE EIGHTH CIRCUIT

No. 03-1296

Claude M. Schoch, Appellee, v. InfoUSA, Inc.; American Business Information Marketing, Inc., Appellants.	* * * * * * * * *	Appeal from the United States District Court for the District of Nebraska

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Submitted: June 19, 2003
Filed: September 3, 2003

Before BOWMAN, BEAM, and RILEY, Circuit Judges.

RILEY, Circuit Judge.

*Info*USA, Inc. and American Business Information Marketing, Inc. (collectively *info*USA) appeal from the district court's[1] order confirming an arbitration award in favor of Claude M. Schoch (Schoch) and entry of judgment in Schoch's favor. *Info*USA argues the award should be vacated because (1) the arbitrator exceeded his contractual

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[1] The Honorable Joseph F. Bataillon, United States District Judge for the District of Nebraska.

authority, and (2) the award is completely irrational and evidences a manifest disregard for the law. We affirm.

I. BACKGROUND

In September 1996, *info*USA bought Schoch's business for $20,000,000 in cash and stock and entered into a three-year employment agreement with Schoch for an annual salary of $225,000. *Info*USA also granted Schoch the option to purchase 360,000 shares of *info*USA stock (180,000 shares before intervening 2-for-1 stock split). The options vested over a four-year period (90,000 shares annually in August of 1997, 1998, 1999, and 2000) and could "be exercised for up to three months after termination of employment or consulting relationship." The employment agreement ended on September 9, 1999, and the parties did not renew the agreement. At the time the employment agreement ended, the options to purchase 270,000 shares had vested, while the option for the remaining 90,000 shares would not vest until August 2000. Even though the employment agreement had ended, Schoch did some work for *info*USA in October, November, and December 1999, but did not get paid for this work. During this time, Schoch apparently attempted to get *info*USA to extend his agreement so he could work until the remaining 90,000 shares vested, but *info*USA refused. In mid-December 1999, *info*USA's stock price rose significantly, and the market price exceeded the exercise price of Schoch's options. On December 17, 1999, Schoch tried to exercise his options to purchase 360,000 shares. *Info*USA refused his tender offer, claiming Schoch's employment agreement ended on September 9, 1999, which meant his three-month exercise period had ended on December 9, 1999.

In March 2000, Schoch sued *info*USA for breach of contract, reformation, and unjust enrichment. In February 2001, Schoch and *info*USA agreed to arbitrate the dispute and the district court granted a stay pending arbitration. The parties hired a retired state court trial judge to arbitrate the dispute. After holding three days of hearings and reviewing post-hearing briefs, the arbitrator issued a nine-page opinion containing his findings and conclusions. The arbitrator decided Schoch continued in an employment relationship until December 17, 1999, such that the options for 270,000 shares had not expired.[2] The arbitrator then decided Schoch's damages for not being allowed to exercise his options amounted to $1,632,000.

Schoch moved the district court to confirm the arbitration award, while *info*USA moved to vacate the award. *Info*USA maintained that a heightened standard of review applied because the arbitration agreement contained the following language: "The Arbitrator shall issue an award consisting of **findings of fact and conclusions of law**. . . . The Arbitrator's decision and award shall be **valid and binding**, judgment may be entered on such award, and such award shall be final as to the Parties, **as long as the Arbitrator has not exceeded his or her authority** (i.e., the award would be limited to disputes arising out of the [Complaint] . . . , and resolved **in accordance with applicable law**)." (emphasis added). Even if a heightened standard of review does not apply, *info*USA argued the arbitrator's award should be vacated because

[2] The arbitrator also determined Schoch was not entitled to compensation for work performed from September through December 1999, and the option for the remaining 90,000 shares did not vest.

he exceeded his contractual authority and the award is completely irrational and evidences a manifest disregard for the law. Refusing to apply a heightened standard of review, the district court granted Schoch's motion to confirm the award and entered judgment for Schoch in the amount of $1,632,000.

II. DISCUSSION

A. Standard of Review

In reviewing the district court's order confirming the arbitrator's award, we accept the court's factual findings unless clearly erroneous, but decide questions of law de novo. *Boise Cascade Corp. v. Paper Allied-Indus., Chem. & Energy Workers,* 309 F.3d 1075, 1080 (8th Cir. 2002). However, the underlying award itself is entitled to "an extraordinary level of deference." *Id.* (citation omitted). We are simply "not authorized to reconsider the merits of an arbitral award, 'even though the parties may allege that the award rests on errors of fact or on misinterpretation of the contract.'" *Id.* (citation omitted). We will confirm the arbitrator's award "even if we are convinced that the arbitrator committed serious error, so 'long as the arbitrator is even arguably construing or applying the contract and acting within the scope of his authority.'" *Id.* (citation omitted).

Although an arbitrator has broad authority, the arbitrator is not wholly free from judicial review. *Id.* An arbitrator's award can be vacated for the reasons provided in the Federal Arbitration Act (FAA). *See* 9 U.S.C. § 10(a) (reasons include corruption, fraud, undue means, evident partiality, misconduct, or ultra vires acts). Relevant to this case, a district court may vacate an arbitrator's award

when the arbitrator exceeds his powers. *Id.* § 10(a)(4). In addition to the statutory reasons for vacating arbitration awards, our court has recognized two "extremely narrow" judicially created standards for vacating an arbitration award. *Hoffman v. Cargill, Inc.*, 236 F.3d 458, 461 (8th Cir. 2001). First, an arbitrator's award can be vacated if it is "completely irrational," meaning "it fails to draw its essence from the agreement." *Boise Cascade,* 309 F.3d at 1080. "An arbitrator's award draws its essence from the [parties' agreement] as long as it is derived from the agreement, viewed in light of its language, its context, and any other indicia of the parties' intention." *Id.* (quoting *Johnson Controls, Inc., Sys. & Servs. Div. v. United Ass'n of Journeymen,* 39 F.3d 821, 825 (7th Cir. 1994)). The second judicially created standard for vacating an arbitration award is when the award "evidence[s] a manifest disregard for the law." *Id.* (citation omitted). An arbitrator's award "manifests disregard for the law where the arbitrators clearly identify the applicable, governing law and then proceed to ignore it." *Id.* (citation omitted).

In addition to the narrow FAA and judicially created standards for vacating arbitration awards, *info*USA asks us to recognize the right of parties to contract for a heightened standard of review of an arbitrator's award. Indeed, *info*USA claims it and Schoch contracted for a heightened standard of review, requiring the district court, and our court, to review the arbitrator's award de novo.

We recognize the circuit courts are split on whether parties to arbitration agreements can expand the scope of judicial review of arbitration awards. *Compare Bowen v. Amoco Pipeline Co.*, 254 F.3d 925, 937 (10th Cir. 2001) (holding "parties may not contract for expanded judicial review of arbitration awards"), *and Chicago Typographical*

Union v. Chicago Sun-Times, Inc., 935 F.2d 1501, 1505 (7th Cir. 1991) (noting parties cannot contract for judicial review of arbitration awards because "federal jurisdiction cannot be created by contract," but recognizing parties "can contract for an appellate arbitration panel to review the arbitrator's award"), *with Roadway Package Sys., Inc. v. Kayser,* 257 F.3d 287, 293 (3d Cir. 2001) ("We now join with the great weight of authority and hold that parties may opt out of the FAA's off-the-rack vacatur standards and fashion their own."), *LaPine Tech. Corp. v. Kyocera Corp.*, 130 F.3d 884, 888 (9th Cir. 1997) (holding courts must honor arbitration agreements that indisputably contract for heightened judicial scrutiny of an arbitrator's award), *and Gateway Tech., Inc. v. MCI Telecomm. Corp.*, 64 F.3d 993, 997 (5th Cir. 1995) (parties can contract for heightened de novo review of arbitration awards).

Our court has specifically reserved resolving this issue until the circumstances require it. In *UHC Management Co. v. Computer Sciences Corp.*, 148 F.3d 992, 997 (8th Cir. 1998), this court made known that contracting for a heightened standard of review is not "yet a foregone conclusion." Expressing grave skepticism, we also made the following statement: "It is not clear, however, that parties have any say in how a federal court will review an arbitration award when Congress has ordained a specific, self-limiting procedure for how such a review is to occur [under the FAA]. . . . Congress did not authorize *de novo* review of such an award on its merits; it commanded that when the exceptions do not apply, a federal court has no

choice but to confirm."[3] *Id.* However, we noted that, if parties could contract for heightened judicial review, "the parties' intent to do so must be clearly and unmistakably expressed." *Id.* at 998.

UHC Management was decided in July 1998. *Info*USA and Schoch entered into their binding arbitration agreement on June 8, 2001. These sophisticated parties had fair warning they needed appropriate language to create heightened judicial review. If *info*USA and Schoch intended to contract for heightened judicial scrutiny, as *info*USA claims they did, one would imagine they would express such an intent using crystal-clear language. They did not. Because the parties did not "clearly and unmistakably" express an intent to have the district court review

[3] While we do not expressly adopt the Tenth Circuit's persuasive reasoning in *Bowen*, we again express skepticism as to whether parties can contract for heightened judicial review of arbitration awards, which would seemingly amend the FAA, crown arbitrators mini-district courts, force federal trial courts to sit as appellate courts, and completely transform the nature of arbitration and judicial review. *See Hoffman*, 236 F.3d at 462 ("Arbitration is not a perfect system of justice, nor is it designed to be. '[W]here arbitration is contemplated the courts are not equipped to provide the same judicial review given to structured judgments defined by procedural rules and legal principles. Parties should be aware that they get what they bargain for and that arbitration is far different from adjudication.' Arbitration is designed primarily to avoid the complex, time-consuming and costly alternative of litigation.") (citations omitted); *Eljer Mfg., Inc. v. Kowin Dev. Corp.*, 14 F.3d 1250, 1254 (7th Cir. 1994) ("Arbitration does not provide a system of 'junior varsity trial courts' offering the losing party complete and rigorous *de novo* review. It is a private system of justice offering benefits of reduced delay and expense. A restrictive standard of review is necessary to preserve these benefits and to prevent arbitration from becoming a 'preliminary step to judicial resolution.'") (citations omitted).

de novo the arbitrator's award, we will not read such an intent into their agreement. The district court correctly reviewed the arbitrator's award under the narrow FAA and judicially created standards. We will now proceed to do the same.

B. No Reason to Vacate Arbitrator's Award

Under the narrow FAA and judicially created vacatur standards enunciated above (as opposed to a rigorous de novo review), we agree with the district court that we have no reason to vacate the arbitrator's award in this case. The arbitrator did not exceed his contractual authority, his award was not completely irrational, and he did not evidence a manifest disregard for the law.

The arbitrator reasonably complied with his contractual authority in issuing his award. He conducted a three-day hearing and reviewed the parties' written briefs before he issued his nine-page award. In his award, the arbitrator recognized and analyzed the appropriate issues to be resolved, as required by the arbitration agreement. He complied with the agreement by issuing factual findings and legal conclusions. After concluding the term "employment or consulting relationship" was broader than simply being an employee, the arbitrator then discussed how Schoch had continued performing work for *info*USA, at *info*USA's request, after the employment agreement ended. Based on this finding, the arbitrator decided Schoch was in an employment relationship until December 17, 1999. In determining Schoch's damages for *info*USA's failure to allow Schoch to exercise his options, the arbitrator stated valid legal principles. After hearing live testimony, reviewing the evidence, and studying the parties'

briefs, the arbitrator concluded Schoch would not have sold all 270,000 shares at a profit, but found no evidence Schoch would not have sold any shares at all. The arbitrator judged the credibility of witnesses, including experts, in deciding Schoch would have sold all of the shares, but at different prices over a period of time. The arbitrator then determined, with the "requisite reasonable certainty," Schoch's damages were $1,632,000.

Although *info*USA may disagree with the arbitrator's factual and legal conclusions, the arbitrator did not exceed his contractual authority. Because the arbitrator attempted to comply with the parties' agreement, the award was not completely irrational, as it drew its essence from the agreement.

Finally, the award does not evidence a manifest disregard for the law. The arbitrator interpreted the contractual phrase "employment or consulting relationship" to be broader than being an employee under an employment agreement. After noting Schoch continued to work for *info*USA after the employment agreement ended, the arbitrator determined Schoch was in an employment relationship. The arbitrator specifically stated he determined damages with the "requisite reasonable certainty." Even if the arbitrator made legal errors, he did not completely ignore the law.

Although we may disagree with the arbitrator's factual findings or legal analysis, our limited review does not authorize us to substitute our judgment for that of an arbitrator hired by the parties. In *UHC Management,* we explained:

> We may not set an award aside simply because we might have interpreted the agreement differently or because the arbitrators erred in interpreting the law or in determining the facts. Although this result may seem draconian, the rules of law limiting judicial review and the judicial process in the arbitration context are well established and the parties here, both sophisticated in the realms of business and law, can be presumed to have been well versed in the consequences of their decision to resolve their disputes in this manner.

Id. (quoting *Stroh Container Co. v. Delphi Indus., Inc.*, 783 F.2d 743, 751 (8th Cir. 1986)).

*Info*USA complains it did not receive the benefit of its bargain. We disagree. *Info*USA did not bargain for the benefits and protections of our state or federal judicial systems. Instead, *info*USA chose to resolve its dispute quickly and efficiently through arbitration. *Info*USA got exactly what it bargained for.

III. CONCLUSION

Because we conclude the district court properly confirmed the arbitration award, we affirm.

A true copy.

Attest:

CLERK, U.S. COURT OF APPEALS, EIGHTH CIRCUIT.

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF NEBRASKA

CLAUDE M. SCHOCH, Plaintiff, vs. INFOUSA, INC., and AMERICAN BUSINESS INFORMATION MARKETING, INC., Defendants.	)	8:00CV203 MEMORANDUM AND ORDER

This matter is before the court on the motion by plaintiff (Schoch) to confirm the arbitration award, Filing No. 31, and the motion by defendants (infoUSA and American Business) to vacate the arbitration award, Filing No. 33. I have carefully reviewed the record, indices of evidence, motions, briefs and relevant case law, and I conclude that the arbitrator's award should be affirmed.

STANDARD OF REVIEW

The scope of review of an arbitrator's decision is very narrow. *See Alvey, Inc. v. Teamsters Local Union No. 688,* 132 F.3d 1209, 1211 (8th Cir. 1997); *United Food & Commercial Workers, Local No. 88 v. Shop 'N Save Warehouse Foods, Inc.*, 113 F.3d 893, 894 (8th Cir. 1997). The agreement must be construed broadly, resolving doubts in favor of validity of the agreement. *Id.* at 895. The arbitrator's award must draw its essence and being from the collective bargaining agreement. *See id.* Unless the award is not susceptible to the interpretation given to it by the arbitrator, the reviewing court cannot interfere with the

award. *See Kewanee Machinery Div. v. Local Union No. 21*, 593 F.2d 314, 318 (8th Cir. 1979). This is true even if the award by the arbitrator rests on errors of fact or on misinterpretations of the contract. *Alvey* at 1211.

"[A]n arbitrator is confined to interpretation and application of the collective bargaining agreement; he does not sit to dispense his own brand of industrial justice." *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593, 597 (1960). The arbitrator cannot amend the contract, although he can look to outside sources to aid in interpreting it. *See Keebler Co. v. Milk Drivers and Dairy Employees Union*, 80 F.3d 284, 288 (8th Cir. 1996). Federal policy strongly favors arbitration. *See United Paperworkers Int'l Union v. Misco*, 484 U.S. 29, 37 (1987). "Because the parties have contracted to have disputes settled by an arbitrator chosen by them rather than by a judge, it is the arbitrator's view of the facts and the meaning of the contract that they have agreed to accept." *Id.* at 37-38. Even if the court is convinced that error has occurred, the decision of the arbitrator cannot be overturned if he acted within the scope of his authority and is construing or applying the contract. *Id.* at 38. Only where there is "manifest disregard" of the law is it subject to reversal. *Wilko v. Swan*, 346 U.S. 427, 436-37 (1953). Manifest disregard has been interpreted to mean "where the arbitrators clearly identify the applicable, governing law and proceed to ignore it." *Hoffman v. Cargill, Inc.*, 236 F.3d 458, 462 (8th Cir. 2001).

Although I have set forth the traditional scope of review in a case such as the one before me, infoUSA and American Business contend that a different standard of review applies in this case. The defendants contend that the arbitration agreement requires findings of fact and

conclusions of law be stated by the arbitrator. The agreement states: "The arbitrator shall issue an award consisting of findings of fact and conclusions of law within thirty days upon completion of the hearing, or as otherwise agreed to by the Parties." Ex. 1, Arbitration Agreement, p. 2, ¶ 2. Defendants cite to the Fifth and Ninth Circuits for their assertion that the traditional standard of review does not apply, but rather a heightened standard of review more akin to a de novo standard is applicable. See *Gateway Technologies, Inc. v. MCI Telecommunications Corp.*, 64 F.3d 993 (5th Cir. 1995); *Lapine Technology Corp. v. Kyocera Corp.*, 130 F.3d 884 (9th Cir. 1997) (allowing for a heightened standard of review if the parties so contract). The Eighth Circuit has acknowledged these two cases; however, the court stated:

> It is not clear, however, that parties have any say in how a federal court will review an arbitration award when Congress has ordained a specific, self-limiting procedure for how such a review is to occur. Section 9 of the FAA provides that federal courts "must grant" an order confirming an arbitration award "unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title." Congress did not authorize de novo review of such an award on its merits; it commanded that when the exceptions do not apply, a federal court has no choice but to confirm.

UHC Management Co. v. Computer Sciences Corp., 148 F.3d 992, 997 (8th Cir. 1998). As a result of this language, I conclude that the Eighth Circuit has not placed its stamp of approval on the abilities of parties to contract for a heightened standard of judicial review. Consequently, I conclude that the standard of review in this case is the one

set forth under the Federal Arbitration Act. *See also, Delta Mine Holding Co. v. AFC Coal Properties, Inc.*, 280 F.3d 815 (8th Cir. 2001), wherein the court stated "only the statutory grounds in § 10(a) of the Act justify vacating an [arbitration] award." *Id.* at 820 (internal citations omitted).

FACTS

In 1996 Schoch sold his business, a software company known as Digital Directory Assistance, to infoUSA. He received $20,000,000 in cash and stock, a three-year employment contract, and 360,000 in stock options. The shares were vested over a four-year period of time. Schoch was required to exercise his options within three months "after termination of his employment or consulting relationship." *See* Award, p. 2. The employment contract expired on September 10, 1999. At that time 270,000 options had vested. It is clear that Schoch continued to "consult" with infoUSA in October, November, and December 1999. During this time Schoch attempted to get infoUSA to extend his employment, but infoUSA refused to do so. Consequently, Schoch tried to exercise his remaining options on or about December 17, 1999. InfoUSA argues that this exercise was outside of the ninety days subsequent to his employment. Schoch contends that he was a consultant well into December and, therefore, his exercise of the options was timely. Thereafter, Schoch filed this lawsuit. The parties then agreed to arbitrate this case and requested a stay pending arbitration. The magistrate granted the stay. Filing No. 26. Schoch moved to confirm the arbitration award, while infoUSA and American Business moved to have it vacated.

ARBITRATOR'S DECISION

Judge James Buckley was selected as the arbitrator in this case. The arbitrator wrote a nine-page opinion outlining the testimony and his findings in this case. The hearing took place on March 6, 7 and 8, 2002. He then reviewed post-trial briefs. In summary, Judge Buckley determined that the "employment or consulting relationship" continued until December 17, 1999, and therefore, those options dealing with the 270,000 shares had vested and had not expired. Award, at p. 3. Additionally, he found that the Notice of Stock Option Grant determined Schoch's status on December 17, 1999, and that Schoch was an employee, as he was asked by infoUSA to remain and train a replacement for the three months following September 10, 1999.

Judge Buckley further determined that there was no binding oral argument to ensure that the remaining 90,000 options would vest during Schoch's tenure. Judge Buckley concluded that the 90,000 shares did not vest. He further determined that Schoch was not entitled to compensation for the work he did from September through December 1999.

Finally, Judge Buckley determined that neither expert was particularly solid on the issue of damages incurred as a result of the failure to sell the 270,000 shares during relevant time periods. Judge Buckley adopted the alternative analysis of the testimony of expert Arthur Cobb and concluded that damages in the amount of $1,632,000 were appropriate.

DISCUSSION

Schoch has asked this court to enter an order confirming the arbitration and for judgment in his favor. InfoUSA and American Business have asked this court to vacate the arbitration award. InfoUSA and American Business first contend that I should apply the heightened standard of review in this case. I have previously stated that I will not do so.

Next, infoUSA and American Business argue that the arbitrator failed to sufficiently delineate his findings of fact and conclusions of law. However, as I read the briefs submitted by both defendants, it is clear that they are really challenging the substantive findings of the arbitrator. More often than not, they merely argue the merits of the factual and legal findings.

I have carefully reviewed the Award entered by Judge Buckley. Although there was not a substantial amount of case law cited, Judge Buckley clearly made legal and factual findings and determinations. For example, he determined that Schoch was an employee in December of 1999. Although he cited to no cases, he reviewed the contract to determine the language that related to Mr. Schoch's status as an employee or a volunteer, and the discussion therein included factors from relevant case law. That finding was crucial to the decision in this case. Even though this finding might have been in error, the arbitrator acted within the scope of his authority in construing the contract.

Further, Judge Buckley made findings regarding the credibility of the expert witnesses and made damage determinations based on this testimony. I conclude that these determinations were based on the arbitrator's

interpretation of the contract. I find that Judge Buckley did not violate any of the statutory grounds upon which I could vacate an arbitration award. The arbitrator's decision does in fact draw its essence from the contract. Consequently, pursuant to the case law cited herein and my limited review of the decision, I affirm the Award issued by the arbitrator.

THEREFORE, IT IS ORDERED ADJUDGED AND DECREED:

1. Plaintiff's motion to confirm the arbitration award, Filing No. 31, is granted;

2. Defendants' motion to vacate the arbitration award, Filing No. 33, is denied; and

3. A separate judgment shall enter herein.

DATED this 19th day of December, 2002.

BY THE COURT:

s/ Joseph F. Bataillon
JOSEPH F. BATAILLON
United States
District Judge

9 U.S.C. § 2 (2003)

§ 2. Validity, irrevocability, and enforcement of agreements to arbitrate

A written provision in any maritime transaction or a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction, or the refusal to perform the whole or any part thereof, or an agreement in writing to submit to arbitration an existing controversy arising out of such a contract, transaction, or refusal, shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

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9 U.S.C. § 9 (2003)

§ 9. Award of arbitrators; confirmation; jurisdiction; procedure

If the parties in their agreement have agreed that a judgment of the court shall be entered upon the award made pursuant to the arbitration, and shall specify the court, then at any time within one year after the award is made any party to the arbitration may apply to the court so specified for an order confirming the award, and thereupon the court must grant such an order unless the award is vacated, modified, or corrected as prescribed in sections 10 and 11 of this title. If no court is specified in the agreement of the parties, then such application may be made to the United States court in and for the district within which such award was made. Notice of the application shall be served upon the adverse party, and thereupon the court shall have jurisdiction of such party as though he had appeared generally in the proceeding. If the adverse party is a resident of the district within which the award

was made, such service shall be made upon the adverse party or his attorney as prescribed by law for service of notice of motion in an action in the same court. If the adverse party shall be a nonresident, then the notice of the application shall be served by the marshal of any district within which the adverse party may be found in like manner as other process of the court.

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9 U.S.C. § 10 (2003)

§ 10. Same; vacation; grounds; rehearing

(a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration –

(1) where the award was procured by corruption, fraud, or undue means;

(2) where there was evident partiality or corruption in the arbitrators, or either of them;

(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or

(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

(b) If an award is vacated and the time within which the agreement required the award to be made has not expired,

the court may, in its discretion, direct a rehearing by the arbitrators.

(c) The United States district court for the district wherein an award was made that was issued pursuant to section 580 of title 5 may make an order vacating the award upon the application of a person, other than a party to the arbitration, who is adversely affected or aggrieved by the award, if the use of arbitration or the award is clearly inconsistent with the factors set forth in section 572 of title 5

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9 U.S.C. § 11 (2003)

§ 11. Same; modification or correction; grounds; order

In either of the following cases the United States court in and for the district wherein the award was made may make an order modifying or correcting the award upon the application of any party to the arbitration –

(a) Where there was an evident material miscalculation of figures or an evident material mistake in the description of any person, thing, or property referred to in the award.

(b) Where the arbitrators have awarded upon a matter not submitted to them, unless it is a matter not affecting the merits of the decision upon the matter submitted.

(c) Where the award is imperfect in matter of form not affecting the merits of the controversy.

The order may modify and correct the award, so as to effect the intent thereof and promote justice between the parties.

IN THE MATTER OF ARBITRATION BETWEEN:

CLAUDE M. SCHOCH,	)	FED. CASE NO. 8:00cv203
Claimant,	)	
	)	
vs.	)	AWARD
	)	
INFO USA, INC., and AMERICAN BUSINESS INFORMATION MARKETING, INC.,	)	
	)	
	)	
	)	
	)	
Respondents.	)	

Hearing was held on March 6, 7, and 8, 2002 on the arbitration between Claimant, Claude M. Schoch (Claimant or Schoch), and Respondents, Info USA and American Business Information Marketing, Inc. (Respondent or Info USA). Evidence was presented and, oral argument having been waived, the matter was taken under advisement. Subsequently, the parties have submitted post-hearing written briefs/arguments.

Upon consideration of the evidence, the parties' briefs, and the applicable law, the Arbitrator makes the following findings of fact and conclusions of fact and law. My findings of fact will be relatively brief but in compliance with the Arbitration Agreement.

This arbitration arises from the sale by Claimant and the purchase by Respondent of Claimant's software publishing company located in Bethesda, Maryland, and called Digital Director Assistance (DDA). The primary function of DDA was to publish CD-ROM telephone directories, The first directory, and the one significant to this arbitration, was the one of the New York and New England area and referred to throughout as "NYNEX".

After extensive negotiations with both parties, represented by experienced counsel, three agreements (contracts) were executed, all combining to effectuate the sale and purchase of Claimant's company. Namely, they were the Asset Purchase Agreement, the Employment Agreement, and the Notice of Stock Option Grant.

The Employment Agreement and the Notice of Stock Option Grant combine to form the heart of the issues in this arbitration.

By the Employment Agreement, Claimant was hired as an employee of Respondent for a fixed period of three years commencing September 10, 1999. The Notice of Stock Option Grant was signed by Claimant on September 20, 1999. It granted Claimant the option to purchase 360,000 shares of Respondents' stock (180,000 before a two-for-one stock split). The Grant vested the shares over a four-year period and required Claimant to exercise his options within three months of the end of his "employment or consulting relationship."

On December 17, 1999, Claimant notified Respondent that he was exercising all his options. Respondent advised Claimant that his options expired on December 10, 1999 on the ground that his employment under the employment agreement terminated on September 10, 1999 and that, therefore, his options expired 90 days thereafter, namely December 10, 1999.

Claimant terminated his employment on December 17, 1999. His claim for damages in this arbitration is twofold.

1. As to 270,000 options, he continued in an "employment or consulting relationship" after September 10,

1999 and until December 17, 1999, and, therefore, those options had vested and had not expired.

2. As to the remaining 90,000 options, he had a conversation with Jon Wellman, then president of Respondent, in which he was assured by Wellman that Respondent would keep him on after three years as an employee or consultant so that he could fully vest the remaining 90,000 options at the end of the fourth year. Respondent denies that any such agreement ever took place.

From the foregoing, it is clear that there are two key issues to resolve:

A. (1) As to the 270,000 options, does the Employment Agreement or the Notice of Stock Option Grant govern as to the status of Claimant on December 17, 1999?

(2) If the Notice of Stock Option Grant governs, was Claimant in an employment or consulting relationship as of December 17, 1999?

B. (1) Did Claimant have a conversation or discussion with Jon Wellman regarding his options and continued employment?

(2) If so, was there an oral agreement sufficient in law to be binding and therefore to support Claimant's claim of breach of contract as to the 90,000 options?

In resolving the issues just identified, I reach the following conclusions:

A. "Employment" and "employment or consulting relationship" are not synonymous. The word "relationship" makes the difference; it makes the term "employment or

consulting relationship" broader than the term "employment," and including "consulting" as well as "employment" strongly suggest a relationship existing after the expiration of the Employment Agreement inasmuch as Claimant was clearly an employee, not a consultant, pursuant to and during the time of the Employee Agreement. Even if the terms are ambiguous, which I find they are not, they were drafted by Respondent and, therefore, must be construed in favor of Claimant. If Respondent wanted to limit the option time to the Employment Agreement, they simply could have so stated. Accordingly, the Notice of Stock Option Grant governs as to Claimant's status on December 17, 1999.

B. When Claimant attempted to exercise his options on December 17, 1999, he was in an employee but not a in [sic] consulting relationship with Respondent. A new and formalized contract was not necessary. During the three years Claimant was an employee under the Employee Agreement, the amount of work did gradually decrease but making the NYNEX monthly product was from the beginning a primary function. By September 10, 1999, the expiration date of his Employment Agreement, making the NYNEX monthly report was virtually the only thing he was doing. At that time, Respondent was in the process of training a replacement to do the NYNEX but for the next three months they asked Claimant to continue doing the NYNEX, which he did, albeit not without some prodding.

Respondent also contends that whatever Claimant did, he was a volunteer. Claimant indeed was not paid for any work after September 10, 1999, nor did he expect any payment. He continued to do the NYNEX as requested in the hope that his numerous requests to be granted consultant status so as to validate the 90,000 options would

be granted. I conclude that Claimant was a volunteer only in the sense that he voluntarily worked without pay and not that he voluntarily did work that was not requested. Therefore, Claimant, doing virtually the same work after September 10, 1999 as before, was in an employee relationship when he served notice to exercise his options which had vested and had not expired.

C. Claimant and Jon Wellman did not effectuate a binding oral agreement to assure Claimant that he could exercise the remaining 90,000 shares.

This conclusion is based upon the following facts, albeit circumstantial evidence:

1. There was no direct evidence of such an agreement other than Claimant's testimony.

2. No attempt was ever made to reduce the agreement to writing, notwithstanding that Claimant was represented by counsel who he said was aware of the promise.

3. No reliance on the conversation or agreement was raised until the arbitration was commenced.

4. In all of Claimant's requests of Respondents' employees to get an extension of his employment or a consulting arrangement, he never mentioned the Wellman promise or assurance to anyone.

I do not find nor suggest that Claimant had no conversation with Wellman relating to his 90,000 options but I do find that any such conversation did not rise to the level of a binding oral agreement that he would be kept on as a consultant or employee so that his 90,000 shares would vest.

Because Claimant has not met his burden of factual proof, it is not necessary to address the legal issues of Statute of Frauds and collateral estoppel.

Claimant seeks two elements of damages:

1. Compensation for his work after the Employment Agreement expired.

2. Damages for the 270,000 options not granted.

I find that Claimant is not entitled to compensation for his work after September 10, 1999. There was no agreement that he be paid while his work was at Respondents' request; he did not expect to be paid and, in fact, did the work voluntarily in the hope if not the expectation that his options would fully vest.

Determining whether Claimant is entitled to any damages as to the 270,000 options and, if so, the amount is not amenable to any precise calculation or mathematical formula. Lost profits can be a measure of damages if they can be determined with reasonable certainty.

I conclude that Dr. Sherman's opinion that Claimant would have sold all his shares at a profit is simply too speculative to accept. On the other hand, it is difficult to find on any practical or evidentiary basis that Claimant would not have sold any of the 270,000 shares during the applicable time periods.

I believe that "reasonable certainty" in a case such as this has a broader meaning and correspondingly a lesser burden to establish as compared to most other situations. Determining where one would or would not sell 270,000 shares of any stock can be difficult but should not be impossible if there is a reasonable basis.

I find Arthur Cobb to be an expert in his field and a very credible witness. But I cannot accept his opinion, even though it is based on his analysis of Claimant's selling methodology, that Claimant would not have sold any of his shares even to the time of the hearing. But after thorough consideration of Mr. Cobb's testimony, particularly of his alternative scenarios, I conclude that his alternative analysis in which he calculates Claimant's damages at $1,632,000 makes sense in the practical realm and meets the requisite reasonable certainty. In doing so, I adopt as my material findings Mr. Cobb's testimony as stated on line 10, page 16 through line 5, page 729 of the transcript of the hearing.

Evidence that related to the complexities of the negotiations and sale of Claimant's company, the circumstances of the execution of the Notice of Stock Option Grant, the calculations of the stock option prices, etc. I considered to be either irrelevant or of insufficient weight to affect my ultimate findings.

In conclusion, I find in favor of Claimant in that his first 270,000 options vested and did not expire and, therefore, he was wrongfully denied their exercise. I further find in favor of Respondent in that Claimant's last 90,000 options did not vest. I further find in favor of Respondent in that Claimant is not entitled to compensation for his work performed after the expiration of the Employment Agreement.

Accordingly, Claimant, Claude M. Schoch, is awarded the sum of $1,632,000 from the Respondents, Info USA and American Business Marketing, Inc. Claimant's complaint is dismissed as to all other claims.

Dated this 14th day of May, 2002.

/s/ James A. Buckley

James A. Buckley
Arbitrator

June 7, 2002

Matthew L. Woods
Attorney at Law
2800 LaSalle Plaza
800 LaSalle Avenue
Minneapolis, Minnesota 55402-2015

Kirk Blecha
Attorney at Law
1500 Woodmen Tower
Omaha, Nebraska 68102-2068

Dear Counsel:

Pursuant to respondent's request for clarification of award, the award is amended to add after the word "hearing" on the third line at page nine the following: "specifically, his analysis and calculations regarding the sale of the stock and the total profit of $1,632,000. I adopt this as findings of fact notwithstanding that Mr. Cobb characterizes it as hypothetical."

All other requests of respondents for clarification are denied.

Yours truly,

/s/ James A. Buckley
James A. Buckley
JAB:lkm

P.S. The award is corrected to change "1999" to "1996" on the fourth and fifth lines of the last paragraph on page two and to change "line 10, page 16" to "line 10, page 716" on the second line on page nine.

AGREEMENT TO BINDING ARBITRATION

This Agreement to Binding Arbitration ("Agreement") is entered into on this 8th day of June, 2001, by and between CLAUDE M. SCHOCH ("Schoch") and INFOUSA, INC., and AMERICAN BUSINESS INFORMATION MARKETING, INC. (hereinafter collectively "InfoUSA"). The Parties hereby stipulate and agree as follows:

WHEREAS, certain disputes exist between and among the Parties, some or all of which form the bases of the legal action filed in the United States District Court for the District of Nebraska which is captioned *Claude M. Schoch v. InfoUSA, Inc.* and *American Business Information Marketing, Inc.*, 8:00CV203; and

WHEREAS, the Parties desire to resolve through binding arbitration all disputes substantially related to the legal action filed in United States District Court for the District of Nebraska which is captioned *Claude M. Schoch v. infoUSA, Inc. and American Business Information Marketing, Inc.*, 8:00CV203; and

WHEREAS, the Parties mutually and collectively covenant and agree to commit themselves in good faith to an arbitrated resolution of all of their disputes pursuant to the terms of this Agreement; and

WHEREAS, the Parties acknowledge that they have each had adequate opportunity to consider the terms of this Agreement, and adequate opportunity to consult legal counsel of their own choosing, and have done so, and they understand the terms and effect of this Agreement and do execute the Agreement and their voluntary, knowing act and deed;

NOW, THEREFORE, for and in consideration of above recitals, which are deemed contractual, the mutual

promises contained herein, and for other good and valuable consideration, the receipt and sufficiency of which is hereby acknowledged, the Parties agree as follows:

1. Selection of an Arbitrator. The Parties hereby covenant and agree that James Buckley shall be the Arbitrator for this matter. In the event James Buckley is unable to serve as Arbitrator, the Parties shall within two weeks after notification that he is unable to serve as Arbitrator, submit a list of four names of other proposed arbitrators. The proposed arbitrators would be drawn from retired judges and/or lawyers. Within ten (10) days, each side could either strike any or all of the other side's proposed arbitrators, or acknowledge their willingness to accept such arbitrators. Assuming that at least one arbitrator from each side's list is acceptable, the names of all acceptable arbitrators would be placed in a pool from which one name would be chosen at random, that name becoming the Arbitrator. If all names are stricken from one or both sides' respective lists, then this process will be repeated until such time as there is at least one unstricken arbitrator from each side's list.

2. Scope of Arbitrator's Powers. The Arbitrator shall be empowered to resolve all disputes arising out of, or related to, the facts alleged in the Complaint filed in Federal District Court and/or the relationship between the Parties. The Arbitrator shall not be bound by the Federal Rules of Evidence but shall use the Federal Rules of Evidence as a guideline for the admissibility of evidence. The Arbitrator shall issue an award consisting of findings of fact and conclusions of law within thirty days upon completion of the hearing, or as otherwise agreed to by the Parties. The Arbitrator's decision and award shall be valid and binding, judgment may be entered on such award, and

such award shall be final as to the Parties, as long as the Arbitrator has not exceeded his or her authority (*i.e.*, the award would be limited to disputes arising out of or related to the fact set forth in the Complaint and the parties' Statements of Claims referred to in Paragraph 7 herein, and resolved in accordance with applicable law).

3. The Hearing. The hearing shall take place in Omaha, Nebraska, at a specific location to be agreed upon by the Parties and Arbitrator. The hearing shall commence within seven (7) months of the appointment of the Arbitrator.

4. Discovery. The Parties shall be allowed to take discovery in accordance with the Federal Rules of Civil Procedure. The Arbitrator shall be empowered to resolve all discovery disputes arising between the Parties. The time for discovery shall be from the appointment of the Arbitrator and shall end one month prior to the hearing.

Four months into the discovery period, the Parties will disclose all information required by Fed. R. Civ. P. 26(a)(2) as to any expert who intends to opine on an issue as to which it has the burden of proof. Responsive information shall similarly be provided thirty (30) days thereafter.

The Parties shall have the right to submit dispositive motions, in accordance with the Federal Rules of Civil Procedure, no later than two months prior to the hearing.

5. Pre-Trial Procedures. Two weeks prior to the hearing, the Parties shall exchange pre-hearing briefs and submit the same to the Arbitrator. At the same time, the Parties will exchange a list of proposed exhibits and witnesses.

6. Costs. All costs and fees of the Arbitrator and costs of the hearing location shall be borne equally by the Parties.

7. Statement of Claim. Within two weeks after the appointment of the Arbitrator, Schoch shall submit a statement of claim, no longer than five pages, outlining the nature of his claim and the requested relief. Within two weeks thereafter, InfoUSA shall submit a response to the statement of the claim, outlining its response and defenses.

IN WITNESS WHEREOF, the undersigned have caused this Agreement to be executed effective as of the date and year first written above.

CLAUDE M. SCHOCH

/s/ Claude M. Schoch

STATE OF MARYLAND)
) ss
COUNTY OF MONTGOMERY)

The foregoing instrument was acknowledged before me this 22 day of May, 2001.

/s/ Joan Kohl
Notary Public

INFOUSA, INC.

By /s/ Fred Vakili
Its CAO

STATE OF NEBRASKA)
) ss
COUNTY OF DOUGLAS)

The foregoing instrument was acknowledged before me this 6th day of June, 2001.

GENERAL NOTARY –
State of Nebraska
RACHELLE L. HOLCOMB
My Comm. Exp. Nov. 23, 2004

/s/ Rachelle L. Holcomb
Notary Public

AMERICAN BUSINESS INFORMATION MARKETING, INC.

By /s/ Fred Vakili
Its CAO

STATE OF NEBRASKA)
) ss
COUNTY OF DOUGLAS)

The foregoing instrument was acknowledged before me this 6th day of June, 2001.

GENERAL NOTARY –
State of Nebraska
RACHELLE L. HOLCOMB
My Comm. Exp. Nov. 23, 2004

/s/ Rachelle L. Holcomb
Notary Public